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Supreme Court, U.S.
FILED
APR 26 1994
OFFICE OF THE CLERK

No. 93-1457

In The

Supreme Court of the United States

October Term, 1993

PHYLLIS G. DALESKE, ARTHUR E. ESCHENBACH, MARIE L. ESCHENBACH, ROBERT E. FIEDLER, SHIRLEY M. FIEDLER, CHARLES B. WEST, DORIS J. WEST, D.A. WHITE & CO. INC., JOAN L. WHITE, d/b/a D.A. White Enterprises, Individually and as representatives of a class consisting of all those owning interests in residential lots, townhouses or condominiums located in the "Pagosa Development", which were sold by Fairfield after March 1, 1983,

Petitioners,

vs.

FAIRFIELD COMMUNITIES, INC., a Delaware corporation; and COLORADO LAND TITLE COMPANY, a Colorado corporation,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

In Failing to Give any Practical Effect to the 1988 Amendment of 28 U.S.C. § 1447(c), The Decision Below is in Direct Conflict with the Second and Ninth Circuits

Prior to the 1988 amendment of 28 U.S.C. § 1447(c), attorney fees were held inappropriate where the removal was "fairly supportable" and not in "bad faith". *Moore v. PermAnente Medical Group, Inc.*, 981 F.2d 443, 447 (9th Cir. 1992). Yet that is the very standard the decision below fixes for attorneys fees *after the 1988 amendment*, i.e. a fee award is inappropriate on finding a "fair basis" and "good faith", demonstrating that the Tenth Circuit gives no actual effect whatever to the amendment.

Respondent's brief in opposition tacitly concedes that the decision below[1] renders meaningless the congressional amendment to 28 U.S.C. § 1447(c), because the amendment is construed as merely negating any requirement that a removal must be in bad faith for costs and attorney fees to be awarded. But respondent's position that other circuits have similarly construed the amendment as having accomplished nothing is plainly in error.

Respondent cannot deny that attorney fees were awardable prior to the 1988 amendment upon a showing of "bad faith" (Pet. at 8). Nor can respondent deny that the word "improvidently" deleted from Section 1447(c) by the 1988 amendment had been treated as equivalent to "frivolously". (Pet. at 9). Nor can it be denied that the former improvidence standard "is clearly less stringent than the 'bad faith' standard . . . " (Pet. at 9).

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[1] The Tenth Circuit's opinion is reported at 17 F.3d 321.

It follows that the Tenth Circuit's novel holding that deletion of "improvidently" from Section 1447(c) in 1988 merely negated a prior requirement of bad faith renders the entire amendment totally meaningless and redundant. Before the 1988 amendment, "just costs" were awardable for "improvident", i.e., frivolous, removals – a standard clearly less stringent than bad faith. Since attorney fees were allowable previously upon a showing of bad faith, and since just costs were allowable for a frivolous removal, deleting "improvidently" was not necessary to "negate" a requirement of bad faith. Merely adding express authority to allow attorney fees in addition to just costs, without deleting the "improvident" requirement, would have negated the old bad faith requirement; but even that was unnecessary since then-existing Rule 11 did not require bad faith to warrant imposition of sanctions in the form of attorney fees. When "improvidently" was deleted, therefore, Congress necessarily intended to abolish the "frivolous" part of the "frivolous or bad faith" standard as well; and thus substantially broadened the right to both costs and attorney fees, without the necessity of finding sanctionable conduct against the removing party.

The Second and Ninth Circuits, in affirming substantial awards of attorney fees in cases remanded to State court, accept this irrefutable logic, in holding that Congress intended to "broaden" the right to attorney fees beyond what was already allowable for Rule 11 violations. *Moore v. PermAnente Medical Group, Inc.*, 981 F.2d 443, 447 (9th Cir. 1992). *Moore* points out that the pre-1988 amendment rule was that attorney fees were "inappropriate" where the removal was "fairly supportable" and not

in "bad faith", 981 F.2d at 446, which is precisely the rule the Tenth Circuit now utilizes *after* the amendment. In accord is *Morgan Guaranty Trust Co. of N.Y. v. Republic of Palau*, 971 F.2d 917, 922, 924 (2nd Cir. 1992), where the court of appeals affirmed the district court award of attorney fees on remand even though the removal was neither improvident nor in bad faith, i.e., had a fair basis and was in good faith. (971 F.2d at 922).

A century ago, long before Congress had inserted the "improvident" requirement into the pre-1988 statute, this Court repeatedly ordered lower courts to award "just costs" against a removing defendant as a matter of course upon remand for lack of Federal jurisdiction. A long line of such cases commences with *Mansfield, C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 386-387 (1884). Now that "improvidently" has been deleted and now that Congress has expressly added "actual expenses, including attorney fees" to the "just costs" previously authorized, it would seem logical that "just costs and any actual expenses, including attorney fees" *should all be allowable as a matter of course* because the amended statute makes no differentiation whatsoever between costs and attorney fees.

In this respect, 28 U.S.C. § 1447(c) as an attorney fee statute is unique, as it is also unique in allowing fees only to the non-removing party. The important objectives of Congress in enacting the Judicial Improvements and Access to Justice Act of 1988 are promoted by allowing costs and attorney fees as a matter of course upon remand to State court. (Pet. at 7, note 3). This statute has a broad and frequent application to the entire gamut of Federal question and diversity cases sought to be removed from State courts. State court plaintiffs opposing

remand were intended to be benefitted by the 1988 amendment; a benefit which the Tenth Circuit's present decision prevents and frustrates.

Respondent argues that the Tenth Circuit did not use the word "frivolous" and thus did not intend to approve such a standard for an award of fees. But respondent is unable to refute the self-evident truth that the Tenth Circuit has approved the district court's use of the "frivolous or bad faith" standard for *allowing* attorney fees, by holding that fees should be *disallowed* upon a showing of a "fair basis" and "good faith" for a removal. The court's approval of this old standard is a logical and necessary consequence of the court's error that Congress' deletion of "improvidently" merely negated a bad faith standard – and thus did not negate the former "frivolous" requirement.

Respondent attempts to soften and blur the insidious impact of the lower court's holding by equating the Second Circuit's use of the word "fairness" with the Tenth Circuit's use of "fair basis" for removal. (Br. at 6). This disingenuous suggestion flies in the face of the Second Circuit's and the Ninth Circuit's rejection of and broadening of the pre-1988 test which they described in virtually the same terms as the Tenth Circuit's post-1988 test. Moreover, the Second Circuit used "fairness" in connection with a more specific standard which would broaden the prior right to attorney fees beyond the frivolous or bad faith standard in rule 11, and which would implement the purpose of Congress in making the 1988 amendment. The district court had considered "overall fairness given the nature of the case, the circumstances of the remand, and the effect on the parties." *Morgan Guaranty*

Trust Co. of N.Y. v. Republic of Palau, 971 F.2d 917, 924 (2nd Cir. 1992). And see, *Moore v. PermAnente Medical Group, Inc.*, 981 F.2d 443, 447 (9th Cir. 1992). The Tenth Circuit's standard for disallowing fees, on the other hand, was merely the discredited "frivolous or bad faith" standard stated conversely. If a party has an arguable or fair basis for taking a removal, his conduct is nonfrivolous. This is not a proper standard to carry out the broader objectives of Congress even though these tests used to impose sanctions may be considered with other elements in a court's evaluation. Merely passing a frivolous and bad faith test, however, plainly does not warrant denial of costs and fees. *Fogerty v. Fantasy, Inc.*, 62 U.S.L.W. 4153, 4158 (U.S. March 1, 1993).

The record in this case reflects that respondent failed to cite a single court decision to the district court in support of its attempted removal to Federal court; while petitioners presented an array of authorities compelling the conclusion that the State court suit provided no basis whatever for bankruptcy jurisdiction under 28 U.S.C. § 1334. In this arcane area of Federal law, as in many other Federal question and diversity cases, any good lawyer can present rational arguments for Federal jurisdiction. According to the Tenth Circuit decision that standard – held by the Ninth Circuit to be the superseded pre-1988 standard – is enough to avoid an award of attorney fees under 28 U.S.C. § 1447(c).

The Tenth Circuit rule, in short, means that, where it is followed, attorney fees will routinely be denied in virtually all cases remanded for lack of Federal jurisdiction, contrary to the evident and express intent of Congress as reflected in the Legislative History of the Judicial

Improvements and Access to Justice Act of 1988, and in the amendment itself.

The Tenth Circuit concept that an award of attorney fees is punitive in nature is also contrary to Congressional intent, which was to reimburse plaintiffs for wholly unnecessary litigation costs inflicted by defendant, without any suggestion of "sanctions". *Moore v. PermAnente Medical Group, Inc.*, 981 F.2d at 447, *affirming* 765 F.Supp. at 1465.

CONCLUSION

Only this Court can provide a uniform standard rejecting the narrow "frivolous or bad faith" test in order to implement important judicial reform legislation. A decision now would be of great practical assistance to district courts which are constantly considering the remand of cases to State courts.

Respectfully submitted,

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